BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY C. BENNETT Claimant	)	
VS.	)	
MV TRANSPORTATION Respondent	)	Docket No. 1,021,544
AND	)	
AMERICAN HOME ASSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the July 19, 2006, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 25, 2006.

APPEARANCES

Chris Miller, of Lawrence, Kansas, appeared for claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, except that the stipulated date of accident is April 19, 2005, not the April 14, 2005, date shown in Stipulation No. 1 of the ALJ's Award.

ISSUES

The ALJ gave equal weight to the ratings given by Dr. Kathryn Hedges, Dr. Edward Prostic, and Dr. Michael Poppa and found claimant suffered a 16.33 percent functional impairment. The ALJ further found, based upon the restrictions recommended by Dr. Kathryn Hedges, that claimant's ability to find employment has been impeded and,

therefore, she is entitled to a work disability. As no evidence of task loss was entered, the ALJ found that claimant had a 0 percent task loss. The ALJ found that claimant exercised good faith in trying to find appropriate employment but remained unemployed, entitling her to a 100 percent wage loss. Accordingly, the ALJ concluded that claimant had a 50 percent work disability. The ALJ also found that claimant is entitled to unauthorized medical care up to the statutory limit and to future medical care upon application to and approval of the Director.

Respondent argues that the ALJ exceeded his jurisdiction in awarding claimant a work disability when that issue was not presented to the court for determination. Respondent further argues that if work disability had been properly presented to the court as an issue, claimant did not sustain her burden of proof that she was entitled to a work disability because she continued to work in an unaccommodated position following her injury until she was terminated for cause. Further, respondent asserts there is no evidence that respondent would not have accommodated claimant's restrictions if she had not been terminated for cause. Respondent requests, therefore, that the Board modify the ALJ's Award to find that claimant is entitled to an award of permanent partial disability compensation based upon her percentage of functional impairment, which respondent now contends is 16.33 percent.

Claimant argues that she is entitled to reasonable and necessary continuing medical treatment, past authorized medical expenses, and unauthorized medical up to the statutory maximum. She further contends that she suffers from a 23 percent permanent partial impairment as well as a 50 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a reservationist and doing clerical work from October 29, 2000, to April 19, 2005. She developed bilateral carpal tunnel syndrome and trigger finger on her left long finger. She filed an Application for Hearing claiming a date of injury "[o]n or about 11/30/04 and each and every day worked since."[1] Claimant was eventually referred to Dr. Lynn Ketchum, who performed left carpal tunnel release and tendolysis of the left long finger on May 19, 2005, and right carpal tunnel release on June 30, 2005.

[1] Form K-WC E-1 filed February 21, 2005.

Claimant was terminated by respondent on April 19, 2005, for allegedly making a mistake on a customer's reservation. As the stipulated date of accident is April 19, 2005, claimant did not work in an unaccommodated job with respondent after her accident, as respondent argued. Furthermore, claimant did not reach maximum medical improvement until after she was terminated by respondent. Claimant testified that since her termination, she has applied for other jobs but has been unable to find a position. She had been receiving unemployment benefits and during that period of time she was required to apply to at least two businesses a week. Although her unemployment benefits stopped in April 2006, she testified she continues to make applications for employment. Claimant's testimony is uncontradicted in this regard; however, other than stating that she applied at Hallmark Cards, the City of DeSoto, and several places that were advertising for customer service positions, there is no evidence of the businesses she made application to or the types of positions for which she applied. Claimant testified that she was told by respondent that they did not have light duty work. She was never offered accommodated employment by respondent.

Claimant was not sent to a vocational rehabilitation expert. There is no evidence in the record of what wage claimant may be capable of earning with her restrictions. There was no expert vocational testimony about the tasks claimant performed in the 15-year-period before her series of injuries and no task loss opinion from any of the doctors. The claimant's description of her job duties with respondent is the only testimony in the record concerning her job tasks. She was not asked about any former jobs and tasks.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on November 30, 2005, at the request of her attorney. At that time, claimant complained of tenderness in her palms and clicking of both hands. Upon examination, Dr. Prostic found no heat, swelling, erythema, or atrophy. There was tenderness of the palmar pillar bilaterally. There was full range of motion and good stability of all joints. He did not find significant crepitus, and there was no evidence of tendonopathy. Her pinch test was normal. Both the Tinel test and the flexion compression median nerve test were negative. Dr. Prostic opined that claimant had developed bilateral carpal tunnel syndrome and stenosing tenosynovitis of the left long finger. Other than weakness, claimant showed a good response to surgery. Using the AMA *Guides*,[2] Dr. Prostic rated claimant as having a 12 percent permanent partial impairment of each upper extremity, which combines for a 14 percent permanent partial disability to the body as a whole.

Dr. Prostic testified that claimant no longer had evidence of carpal tunnel syndrome or stenosing tenosynovitis. The remaining physical findings were tenderness over the area that was operated and some loss of grip strength. Dr. Prostic did not think claimant gave

[2]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

maximum effort on the grip testing, which was why he gave her a 12 percent impairment rating to each upper extremity rather than 20 percent. He did not think claimant would require medical treatment in the future. Dr. Prostic did not say whether claimant needed permanent work restrictions.

Dr. Michael Poppa, who is board certified in occupational medicine and occupational preventive medicine, examined claimant on June 1, 2006, at the request of respondent. Upon examination of claimant, Dr. Poppa found that pinprick testing revealed no evidence of residual sensory loss involving the digits of either hand. Claimant complained of discomfort on palpation involving the palmar surface of each hand. Pinch grip and hand grip were consistent with a right hand dominant individual. Dr. Poppa performed Jamar hand dynamometer testing, which revealed less than maximum effort on claimant's part on her left.

Dr. Poppa opined that claimant had reached maximum medical improvement concerning her work-related overuse syndromes involving her hands, stating that she had good results after her surgeries. He did not think she would require additional medical treatment and opined that she was capable of performing her "regular duties."[3]

Using the AMA *Guides*, Dr. Poppa rated claimant as having a 10 percent impairment of each upper extremity, which converted to a 6 percent whole person impairment of each upper extremity. These combined to form a total 12 percent permanent partial impairment of the whole person.

Dr. Kathryn Hedges, a neurologist, examined claimant on March 6, 2006, at the request of the ALJ. Dr. Hedges found that claimant had decreased pin sensation and decreased temperature sensation on the left hand on the first two fingers. On the right hand, claimant had decreased pin sensation on the first three fingers and decreased temperature sensation on the first four fingers. She had decreased intrinsic hand strength bilaterally. She had pain with the Tinel's sign bilaterally at the wrists and a negative Phalen's sign bilaterally. She had decreased grip strength in both hands.

Using the AMA *Guides*, Dr. Hedges rated claimant as having a 20 percent upper extremity impairment bilaterally, which converts to a 12 percent whole person impairment bilaterally. Under the Combined Value Table, this converted to a 23 percent permanent partial impairment to the body as a whole.

Dr. Hedges did not find that any future medical would be necessary, other than claimant may need antiinflammatories on a regular basis for pain. Dr. Hedges recommended that claimant be evaluated by a vocational rehabilitation specialist. She

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[3] Poppa Depo., Ex. 2 at 4.

gave claimant restrictions of no repetitive movements of the wrist for more than 15 minutes, no gripping greater than 5 minutes, and no pushing or pulling greater than 10 pounds.

As stated, the ALJ averaged the opinions of Drs. Prostic, Poppa and Hedges and found claimant's functional impairment to be 16.33 percent. Respondent agrees with this finding but argues that the ALJ erred by awarding claimant a higher percentage of permanent partial disability based on work disability because claimant did not request a work disability. Under the facts and circumstances of this case, the Board agrees with respondent's contention. Both functional impairment and work disability are included within the definition of permanent partial disability.[4] Generally, when nature and extent of disability is made an issue, all possible forms of disability, including functional, work and permanent total disability are included, absent a stipulation the contrary.[5] In this case, however, at the conclusion of the Regular Hearing, the ALJ set terminal dates of June 15, 2006, for the claimant and July 17, 2006, for the respondent and then the ALJ asked whether these dates fit within the dates of the scheduled depositions. Counsel for claimant answered:

> Yes, Judge. We're actually not going to take any testimony. We don't need 30 days unless you particularly want us to have them. We're relying on the fine independent evaluating physician for our impairment, Judge.

This statement, while not precisely a stipulation, informed the Court and counsel for respondent that claimant was not making a claim for work disability. Respondent contends it relied upon this representation in making its record in defense of this claim.[6] Claimant's counsel never disabused the Court and respondent of this. To the contrary, claimant repeated this assertion in her submission letters to the ALJ. "What is the nature and extent of Ms. Bennett's permanent impairment, as a result of her injuries; with 'functional impairment' only being claimed by her, at present."[7] Likewise, the ALJ never disabused the parties of their belief that the issue of the nature and extent of claimant's disability was limited to the percentage of claimant's impairment of function.

Under these facts, the Board finds it was error for the ALJ to enter an award based on work disability. Per the statements of counsel, claimant's award will be limited to her

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[4] K.S.A. 44-510e.

[5] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 695, 6 P.3d 947 (2000).

[6] Respondent's Brief of Appellant filed September 6, 2006, at 8.

[7] Claimant's Submission Letter filed May 18, 2006, at 2; Claimant's Submission Letter filed July 17, 2006, at 2.

percentage of permanent functional impairment. The Board affirm's the ALJ's finding of a 16.33 percent impairment.

Neither Dr. Prostic nor Dr. Poppa believed claimant needed additional medical treatment. Dr. Hedges, however, opined that claimant "may continue to need antiinflammatories on a regular basis for pain and would need to see a physician on a periodic (every six-month basis) for evaluation and treatment related to the same."[8] Based on this, the Board orders respondent to provide claimant with a list of three physicians from which claimant may select one to serve as her authorized treating physician.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 19, 2006, is modified to award claimant ongoing medical treatment and a 16.33 percent permanent partial general disability.

The claimant is entitled to 16 weeks of temporary total disability compensation at the rate of $294.83 per week or $4,717.28 followed by 67.61 weeks of permanent partial disability compensation at the rate of $294.83 per week or $19,933.46 for a 16.33 percent functional disability, making a total award of $24,650.74.

As of October 31, 2006, there would be due and owing to claimant 16 weeks of temporary total disability compensation at the rate of $294.83 per week in the sum of $4,717.28 plus 64 weeks of permanent partial disability compensation at the rate of $294.83 per week in the sum of $18,869.12 for a total due and owing of $23,586.40, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $1,064.34 shall be paid at the rate of $294.83 per week for 3.61 weeks or until further order of the Director.

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. The Board notes that the ALJ advised claimant's counsel in the Award that he should submit his contract with claimant for approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

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[8] IME report of Dr. Kathryn Hedges filed March 13, 2006, at 4.

Dated this _____ day of November, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I believe the issue presented in this appeal is whether an administrative law judge (ALJ) has the authority to add an issue to be decided in the trial of the claim. I believe the ALJ does have that authority. Nonetheless, in this instance the ALJ failed to advise the parties that he believed work disability was an issue and, therefore, the ALJ denied the parties due process. Consequently, the claim should be remanded to the ALJ to give the parties an opportunity to address that issue.

One of the most basic principles regarding the Workers Compensation Act is that the public has an interest in the proceedings. As early as 1922, the Kansas Supreme Court held that the Workers Compensation Act was passed, in part, for the benefit of the general public:

> Moreover, the workmen's compensation act was not passed for the benefit alone of the injured employee and the employer. It is well understood that there were supposed to be three parties interested: the employer, the employee and the public, and that a broad public policy moved the legislature to enact the measure because of the waste of life and limb in industrial accidents, and because the public, in the end, paid for the financial loss in the increased price of the product.[9]

The interest of the general public is readily evident in claims that are settled before an ALJ. In those claims, the Workers Compensation Act requires the ALJ to determine

[9] *Cramer v. Railways Co.*, 112 Kan. 298, 303, 211 Pac. 118 (1922).

whether the proposed settlement is in the best interest of the injured worker or whether the settlement will avoid undue expense, litigation or hardship.[10] Similarly, in litigated claims an ALJ should be empowered to raise issues that should be addressed in the interests of the employee, employer or general public.

Another basic principle is that ALJs and this Board are not bound by technical rules of procedure. Conversely, K.S.A. 44-523, which pertains to the procedure under the Act, requires the ALJs and Board to give the parties a reasonable opportunity to be heard and present evidence, an expeditious hearing, and to act reasonably and without partiality. In interpreting that statute, the Kansas Supreme Court has held that any appropriate procedure may be utilized as long as it is not prohibited.

> K.S.A. 44-523 provides in part that the director or court in a workmen's compensation proceeding shall not be bound by technical rules of procedure, and that they shall act reasonably and without partiality. The fair implication therefrom is that any procedure which is appropriate and not prohibited by the workmen's compensation act may be employed.[11]

There is no provision of which I am aware that prohibits an ALJ or this Board from raising an issue that the parties did not first raise. Sometimes issues should be raised by the ALJ and Board in the interest of justice, sometimes as a necessity in resolving the claim. Indeed, the Kansas Court of Appeals has ruled that this Board is not restricted to the issues the parties have raised for review.[12] Similarly, the Board upon its own motion raised, addressed and awarded permanent total disability benefits when those benefits were not requested by the claimant and when the parties designated the issue as the extent of claimant's *permanent partial disability*.[13]

Finally, the Kansas Court of Appeals has seemingly addressed the issue whether an ALJ is empowered to raise an issue not specifically designated by the parties. In *Bahr*,[14] the worker sought permanent disability benefits for an occupational disease. The ALJ specifically ruled the worker did not prove she was disabled by an occupational disease.

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[10] K.S.A. 44-531.

[11] *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, Syl. ¶ 1, 515 P.2d 735 (1973); *Drennon v. Braden Drilling Co., Inc.*, 207 Kan. 202, Syl. ¶ 3, 483 P.2d 1022 (1971).

[12] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[13] *Lott-Edwards v. Americold Corporation*, Nos. 175,770; 175,771; & 223,800, 1998 WL 921307 (Kan. WCAB Dec. 28, 1998, *as amended* Jan. 22, 1999), *aff'd*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[14] *Bahr v. Iowa Beef Processors, Inc.*, 8 Kan. App. 2d 627, 663 P.2d 1144, *rev. denied* 233 Kan. 1091 (1983).

Conversely, the ALJ ruled the worker sustained an accidental injury. And the District Court adopted the ALJ's findings and award.

The Kansas Court of Appeals defined the issue as whether the ALJ could award benefits for an accidental injury when none was claimed. The Court framed the issue, as follows:

> The issue presented here on appeal is whether the administrative law judge can, on his own, make an award based on an accidental injury when no such accidental injury has been claimed and no notice of that particular theory of recovery afforded to the respondent.[15]

In short, the Kansas Court of Appeals determined the ALJ had the authority to enter the award for an accidental injury and affirmed the ALJ and District Court.

For the above reasons, the ALJs have the authority to raise issues in the claims before them. But in this instance, Judge Avery did not advise the parties that he was going to consider the issue of work disability. Therefore, the parties did not have an opportunity to provide their relevant evidence on that issue. Consequently, the parties have been denied due process and the Award should be set aside with the claim remanded to the ALJ to permit the parties to introduce additional evidence.

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[15] *Id.* at 631.